

January 24, 2019

The Honorable William H. Pauley III  
United States District Court, Southern District of New York  
500 Pearl Street, Courtroom 20B  
New York, New York 10007-1312

Case: *Commerzbank AG v. U.S. Bank Nat'l Ass'n et al.*, No. 16-cv-04569-WHP

**Subject: Joint Letter Concerning Status of Remaining Discovery**

Dear Judge Pauley:

This is the parties' joint letter setting forth the status of and future schedule for depositions and the status of ongoing discovery, as directed by the Court's December 26, 2018 order (ECF No. 172).

**A. Status of depositions**

The parties have worked cooperatively and diligently to complete all discovery prior to the February 11, 2019 end date for fact discovery. The following depositions remain to be completed within the discovery schedule, and the parties have jointly agreed, subject to the Court's permission, to complete a few depositions after the discovery cutoff when schedules or health concerns did not permit completion earlier. The parties agree that these few straggler depositions will not delay expert reports or any other case deadline.

Depositions scheduled or to be scheduled between now and the close of fact discovery:

1. Vijay Radhakishun (Plaintiff) is scheduled for January 25 in London, UK.
2. Joan Chubb (U.S. Bank) is scheduled for January 29 in Boston, MA.
3. Markus Streck (Plaintiff) is scheduled for January 30 in London, UK.
4. Martha Boduch (BANA) is scheduled for January 30 in Chicago, IL.
5. Patrick Kubik (BANA) is scheduled for January 30 in Chicago, IL.
6. Daniel Radick (BANA/U.S. Bank) is scheduled for January 31 in Chicago, IL.
7. Holger Rabelt (Plaintiff) is scheduled for February 1 in London, UK.
8. John Cutting (Plaintiff) is scheduled for February 1 in New York, NY.
9. Christian Claffy (BANA) is scheduled for February 7 in Chicago, IL.

10. James Byrnes (U.S. Bank) is scheduled for February 7 in Boston, MA.
11. Latonia Hubbs (Plaintiff) is scheduled for February 7 in New York, NY.
12. Brian Anderson (BANA) is scheduled for February 11 in Chicago, IL.
13. Jay Miller (BANA) is not yet scheduled, but Plaintiff has committed to no more than a half day of questioning and is considering whether it may take the deposition via video or audio link instead of live to save all parties time and costs.

The depositions to be completed after February 11 are:

1. Plaintiff's deposition of Sorrell Elbert, an employee of U.S. Bank, whose deposition on January 23, 2019 was canceled due to health concerns. The extension will not delay expert reports or any other case deadline.
2. Plaintiff's deposition of Lisa Brewster, a former employee of U.S. Bank, with availability on March 20 or 21, 2019. The extension will not delay expert reports or any other case deadline.
3. Plaintiff's deposition of U.S. Bank's 30(b)(6) witnesses. The parties propose the depositions of one designated 30(b)(6) witness on a date to be agreed in February, and the other designated 30(b)(6) witness, also a noticed fact witness, on a date to be agreed the weeks of February 11 or 18, with fact testimony to follow. The extension will not delay expert reports or any other case deadline.
4. Plaintiff's deposition of BANA's 30(b)(6) witness and the fact deposition of that same witness. The parties are meeting and conferring about the extent to which BANA may be able to provide information acceptable to Plaintiff to alleviate its desire for 30(b)(6) testimony. But, should live testimony be necessary, they propose February 21 for the deposition of BANA's 30(b)(6) witness, to be followed later that day or the next day with the deposition of the same person who has been noticed in her individual capacity. The extension will not delay expert reports or any other case deadline.
5. Defendant's deposition of Plaintiff's 30(b)(6) witness. Defendants served today a Rule 30(b)(6) notice. The parties will promptly meet and confer concerning the scope and timing of the deposition, which they will schedule as promptly as possible. Should the parties fail to reach agreement, they will present their dispute no later than the consolidated discovery letter to be filed on or before February 15, 2019, if that procedure is acceptable to the Court. The extension will not delay expert reports or any other case deadline.
6. Depositions of the seven former Commerzbank employees (four in Germany, three in England) that are the subject of Defendants' application under the Hague Convention, if allowed by this Court and by the authorities in the designated jurisdictions.

Commerzbank opposes the application. The issue is *sub judice* (ECF Nos. 173, 176, 183, 187, 194).

#### **B. Status of interrogatories and requests to admit**

As with depositions, the parties have worked cooperatively to complete interrogatories and requests for admissions and to resolve disputes without requiring court intervention. The parties exchanged requests to admit along with final sets of interrogatories on January 11, 2019, and have agreed to supplement certain of their answers after expert discovery, when more necessary information will be available.

There is one interrogatory concerning fees paid to trustees that is at impasse, and the parties are discussing, and hope to resolve, other issues relating to interrogatories and requests to admit. Defendants also are considering whether they will move for a protective order with respect to Plaintiff's requests for admission, which comprise some 1,467 requests in total. The parties ask leave to raise any outstanding issues concerning interrogatories and requests to admit in the consolidated discovery letter to be filed on or before February 15, 2019, with the exception of any outstanding issues concerning written discovery served on January 11, 2019, which would be raised in a joint letter to be filed within two weeks of service of responses to that written discovery.

#### **C. Document production and privilege logs**

The parties' productions are substantially complete. The parties reached an agreement on running some German-language search terms over Commerzbank's documents. Commerzbank will produce any additional documents resulting from these searches on or before the close of fact discovery. The parties hope to resolve any open issues concerning the sufficiency of their respective productions cooperatively and request leave to raise any issues that they have been unable to resolve in the consolidated discovery letter to be filed on or before February 15, 2019.

The parties are still conferring about privilege issues, which have not occupied a high priority in the parties' dedicated effort to complete fact discovery in a timely manner.

#### **D. Third-party discovery**

The parties have diligently pursued discovery from third-parties. Although such discovery is largely complete, there remain a number of third-parties who have not produced, and cannot produce, mortgage loan files, underwriting guidelines, and solvency and repurchase materials, prior to the fact-discovery deadline. Because these third-party files are primarily relevant to Phase 2, which will not begin until June, a slightly delayed production will not impact any of the deadlines in this case. To minimize the burden on the third-parties, the parties jointly request that third-parties be permitted to produce through March 29, 2019 discovery requested prior to the February 11 discovery cutoff date. This extension of third-parties' deadline to produce will not delay expert reports or any other case deadline.

The parties jointly thank the Court for its attention to this case, including its assistance

with the discovery issues that have arisen in the past few months.

Respectfully submitted,

By: /s/ Philip R. Schatz

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